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Nos. 89-1714, 90-113 and 90-114

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IN THE

Supreme Court of the United States

OCTOBER TERM 1989

Harriet Pauley, Survivor of John C. Pauley, *Petitioner*,

v.

Bethenergy Mines, Inc., *et al.*, *Respondents*.

Clinchfield Coal Company, *Petitioners*,

v.

Director, Office of Workers' Compensation Programs, United States Department of Labor, *et al.*, *Respondents*.

Consolidation Coal Company, *Petitioners*,

v.

Director, Office of Workers' Compensation Programs, United States Department of Labor, *et al.*, *Respondents*.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE THIRD AND FOURTH CIRCUITS

BRIEF OF THE NATIONAL COAL ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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BRIEF OF THE NATIONAL COAL ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTRODUCTION

For the third time[1] in four years, this Court is being asked to preserve the basic right of mine operators to defend themselves in claims under the Black Lung Benefits Act. 30

[1] *Mullins Coal Co., Inc. of Virginia v. Director*, OWCP, 484 U.S. 135 (1987) ("*Mullins*") and *Pittston Coal Group v. Sebben*, 484 U.S. 105 (1988) ("*Pittston Coal Group*").

U.S.C. §§ 901-945 (1988) ("the Act" or "BLBA"). This time, the question squarely presented is whether a miner who is able to obtain presumptive entitlement must be awarded benefits whether or not he has black lung disease (*i.e.*, pneumoconiosis) or is totally disabled by the disease.

The Act provides benefits to miners who are "totally disabled due to pneumoconiosis." 30 U.S.C. § 901(a). In *Mullins*, this Court described the elements necessary for an award of benefits under the Act: "Disability benefits are payable to a miner if (a) he or she is totally disabled, (b) the disability was caused, at least in part, by pneumoconiosis, and (c) the disability arose out of coal mine employment." *Mullins*, 484 U.S. at 141. *See also* 30 U.S.C. § 921(a).

This time the Court is presented with two Fourth Circuit Court decisions[2] which interpret regulations under the Act to provide that a claimant who is statutorily barred from recovery may nevertheless recover benefits. The Fourth Circuit achieves this incredible result by vitiating virtually all rebuttal rights under the Act and compelling payment of benefits where all the relevant medical evidence clearly shows that the miner does not have black lung disease.

Negating defense rights, particularly to this degree, denies defendants fundamental fairness and due process, is contrary to the Act and to the view of this Court in *Mullins* that "all relevant evidence" must be admissible at some point during the proof process. *See, generally, Mullins*, 484 U.S. at 1149-51. These decisions should be overturned.

[2]*Taylor v. Clinchfield Coal Co.*, 895 F.2d 178 (4th Cir. 1990); *Dayton v. Consolidation Coal Co.*, 895 F.2d 173 (4th Cir. 1990); *Bethenergy Mines Inc. v. Director, OWCP*, 890 F.2d 1290 (3d Cir. 1989) ("*Bethenergy Mines*").

INTEREST OF AMICI[3]

The National Coal Association ("NCA") is a trade association representing coal mine operators who produce over sixty-one percent of the nation's coal. NCA's membership includes operating coal mining companies of all sizes, as well as coal brokers, equipment suppliers, coal transporters, consultants, electric utilities and resource developers.

NCA producer members, and all other U.S. coal producers, are responsible for the payment of benefits to eligible claimants under Part C of the Black Lung Benefits Act, 30 U.S.C. §§ 931-945, in two direct ways: (1) as individual coal mine operator defendants,[4] 30 U.S.C. §§ 932-933; and (2) as mandatory payors of a producers' tax into the Black Lung Disability Trust Fund ("BLDTF" or "Trust Fund"), 26 U.S.C. § 4121. Revenues collected for the BLDTF are used to pay compensation awards to eligible claimants whose coal mine employment ended before January 1, 1970; or in cases in which an individual responsible coal mine operator cannot be identified. 30 U.S.C. § 934, 26 U.S.C. §§ 9501(d)(2), 9501(d)(1)(B). The BLDTF also pays all administrative expenses of the Departments of Labor, Treasury, and Health and Human Services, which operate the black lung program. 26 U.S.C. §§ 9501(a)(2), 9501(d)(5). If the BLDTF is unable to meet its obligations with the funds generated by the producers' tax on coal, it borrows money from the U.S. Treasury, which the

[3]Pursuant to Rule 37.3, written consents from counsel of record for all parties to these consolidated proceedings are being filed with the Clerk of this Court with this Brief.

[4]Coal operators must secure federal black lung compensation liability by purchasing workers' compensation insurance or by qualifying as a self-insurer. 30 U.S.C. § 933. Both the self-insurance and purchased insurance arrangements involve intricate financial planning by the coal operator. This planning is based on the number of claims as a percentage of payroll and the expected approval rate.

BLDTF must repay with interest. 26 U.S.C. §§ 9501(c), (d)(4).

The tax paid by coal producers into the BLDTF, augmented by two tax increases,[5] is currently set at $1.10 per ton on underground-mined coal and $.55 per ton on surface-extracted coal. 26 U.S.C. §§ 4121(a), (b). The BLDTF has collected over $5.66 billion in tonnage taxes from coal producers since 1978.[6] But the BLDTF has paid out over $8.64 billion in compensation since 1978.[7] In order to meet the shortfall between compensation levels and BLDTF revenues, the BLDTF has been augmented by appropriations from the general treasury. As a result, the BLDTF currently owes the U.S. Treasury

[5]Black Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119, § 102(a), 95 Stat. 1635 (1981); Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 13203(a), (b), 100 Stat. 312 (1986) [hereinafter cited as 1986 Budget Reconciliation Act]. Congress provided that the 1981 tax increase was temporary, and that the producers' tax would revert to lower, 1978 rates by January 1, 1996, or when the BLDTF was no longer in debt to the U.S. Treasury for repayable advances or interest, whichever occurred first. Black Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119 § 102(a), 95 Stat. 1635 (1981); the 1986 Budget Reconciliation Act, Pub. L. No. 99-272, § 13203(c), 100 Stat. 313. In 1987, the Administration proposed to increase the tax on producers yet a third time to raise $400 million in additional revenue. Executive Office of the President, Office of Management and Budget, *Budget of the U.S. Government, Fiscal Year 1988* at 2-41. Congress refused, instead extending the 1996 date for reversion of the current tax to the lower 1978 rate until January 1, 2014. Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 99-203, § 10503 (1987), amending 26 U.S.C. § 4121(e)(2).

[6]Staff of Joint Comm. on Taxation, 99th Cong., 2d Sess., *Summary Description of User Fees and Other Revenue Proposals in the President's Fiscal Year 1986 Budget, the Budget Resolution, and Certain Other Revenue Issues* 3 (Comm. Print 1985); and information supplied by James DeMarce, Director for the Division of Coal Mine Workers Compensation, U.S. Dep't of Labor ("DOL"), in a telephone interview with Bruce Watzman, NCA (Apr. 27, 1990).

[7]*Id.*

nearly $3.05 billion.[8] To relieve pressure on the BLDTF, Congress in 1985 passed a 5-year moratorium on interest accruals on the indebtedness of the BLDTF. The moratorium ended September 30, 1990.[9] The present interest on the debt is $1,032,850.[10] The additional interest on the debt in fiscal year 1991 is estimated to be $328 million.[11]

The three decisions before this Court, will have a dramatic impact on the coal industry.

Unless reversed, the decisions of the Fourth Circuit will force the coal industry, directly or indirectly, to accept liability for thousands of claims for which Congress did not intend the industry to be liable.[12]

The unreasonable increase of unanticipated and unfunded liability which will result if these cases are not reversed will come at a time when the American coal industry can ill afford it. NCA members are therefore critically interested in this Court's resolution of the important issues presented by these consolidated cases.

[8]U.S. Dep't of the Treasury, *Black Lung Disability Trust Fund, Status of Funds* (Sept. 1990) (available through the U.S. Dep't of the Treasury).

[9]1986 Budget Reconciliation Act, Pub.L. No. 99-272, § 13203(b) 100 Stat. 312.

[10]Information supplied by James DeMarce, Director for the Division of Coal Mine Workers' Compensation, U.S. Dep't of Labor in a telephone interview with Bruce Watzman, NCA (Dec. 10, 1990).

[11]*Id.*

[12]Industry actuaries and the government view the present value of federal black lung claims at $1.5 billion dollars per 10,000 awarded claims. Information supplied by Robert K. Briscoe, Milliman & Robertson, Inc., Consulting Actuaries, N.Y., N.Y. and James DeMarce, Director for the Division of Coal Mine Workers' Compensation, U.S. Dep't of Labor in separate telephone interviews with Herve Levin, sole practitioner, Dallas, Tex. and consultant to Milliman & Robertson, Inc., Consulting Actuaries (Apr. 27, 1990).

SUMMARY OF ARGUMENT

Department of Labor rebuttal rules reflect clear Congressional intent that "all relevant medical evidence" be considered at some point in the proof process. DOL regulations achieve the liberality to miners Congress sought in the 1977 amendments to the Black Lung Benefits Act but also preserve employer rights to meaningful defenses against non-meritorious claims by requiring consideration of medical evidence in adjudications of black lung benefit claims, reflecting Congress's intent that DOL preserve the basic integrity of the black lung programs by requiring a finding of the presence of black lung disease.

The Act's sole purpose is to provide benefits on account of total disability or death due to pneumoconiosis. 30 U..S.C. § 901(a). Fourth Circuit decisions before this Court eliminate an operator's right to contest on rebuttal whether a miner, in fact, has pneumoconiosis. As a result, the Fourth Circuit has held benefits can be awarded in DOL interim presumption claims to a miner who not only is not totally disabled due to pneumoconiosis but doesn't even have the disease. The Fourth Circuit's position contradicts Congress's mandate, misconstrues the Social Security rebuttal provisions, is contrary to this Court's decision in *Mullins Coal Co. Inc. of Virginia V. Director OWCP*, and results in liabliity to private parties without due process of law.

This Court's decision in *Pittston Coal Group v. Sebben* does not compel invalidation's of DOL's rules. This Court expressly declined to rule on DOL's rebuttal rules in that case. Unlike in *Pittston Coal Group*, DOL's rebuttal rules are not more restrictive than SSA's rebuttal provisions. Finally, neither the Act nor its legislative history supports the idea that miners have more rights when the Trust Fund, rather than an employer is the defendant.

ARGUMENT

I.

THE DEPARTMENT OF LABOR'S INTERIM PRESUMPTION REBUTTAL PROVISIONS CONFORM TO THE PURPOSE AND LANGUAGE OF THE BLACK LUNG BENEFITS ACT

A. The DOL Rebuttal Provisions Reflect Congressional Intent

Title IV of the Federal Coal Mine Health & Safety Act of 1969[13] is divided into two parts, Part B and Part C. Part B deals with claims filed on or before June 30, 1973, and is funded by general federal revenues. The Social Security Administration ("SSA") was given the responsibility to administer Part B claims.[14] Part C deals with claims filed after that time. Awards under Part C are the responsibility of mine operators. DOL was chosen to administer Part C claims.[15]

The Secretary of Labor was not authorized to write regulations defining total disability under the BLBA until Congress amended the Act in 1977. Under the original Act, only the Secretary of Health, Education and Welfare was authorized to promulgate regulations for determining whether benefits should be paid under the program. Congress originally directed

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[13]Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, §§ 411-426, 83 Stat. 792 (1969), *reprinted in* 1969 U.S. Code Cong. & Ad. News 823, 880-886 [hereinafter cited as the 1969 Act].

[14]The 1969 Act, *supra* note 13, at §§ 411-414. In 1972 Congress amended the Act and extended Part B to include claims filed on or before June 30, 1973. Black Lung Benefits Act of 1972, Pub. L. No. 92-303, § 5, § 7, 86 Stat. 155-157 (1972) *reprinted in* 1972 U.S. Code Cong. & Ad. News 183, 189, 190, 192 (amending the 1969 Act, Pub. L. No. 91-173, § 414 and adding a new § 415) (hereinafter cited as the 1972 amendments).

[15]The 1969 Act, *supra* note 13, at §§ 421-424.

that SSA's permanent regulations were to be applied in Part C claims.[16]

In response to Congressional concerns expressed during the development of the 1972 amendments to the Act, S. Rep. No. 743, 92d Cong., 2d Sess. 18-19, *reprinted* in 1972 U.S. Code Cong. & Ad. News 2322-23, about speeding up claims adjudication and enhancing the likelihood of approval notwithstanding a shortage of medical testing facilities in mining regions of the country, SSA promulgated a special interim presumption at 20 C.F.R. § 410.490(b). See 20 C.F.R. § 410.490(a) (1990). This presumption applied only to Part B claims. 20 C.F.R. § 410.490(b)(1990).

In the 1977 amendments to the Act,[17] Congress directed the Secretary of Labor to write his own regulations (in two sets) to be applied to reopened and newly filed Part C claims. These amendments specified, however, that in the rules for previously denied and pending claims subject to re-review by the 1977 legislation, such regulations must not provide more restrictive criteria than those applicable to a claim filed on June 30, 1973. 30 U.S.C. §§ 902(f)(2), 945.

The Department of Labor responded with its interim presumption 20 C.F.R. § 727.203 (1990) that incorporated the medical criteria of the SSA interim presumption and, reflected congressional concern that the basic integrity of the program be preserved,[18] Labor's regulations also specifically mandated consideration of all relevant medical evidence, and preserved the employer's right to meaningful defenses against non-meritorious claims by requiring the consideration of scientific and medical evidence in the adjudication of black lung benefit claims.

[16]The 1969 Act, *supra* note 13, at § 422(h).

[17]Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (1978) [hereinafter cited as the 1977 amendments].

[18]*See* 124 Cong. Rec. 2333 (1978) (statement of Sen. Javits, conferee and sponsor):

I wish to assure my colleagues that although the bill incorporates a number of liberalized standards governing the adjudication of black lung benefit

The Department of Labor's regulations achieved the liberality to miners that Congress sought. Armed with its new presumption, Labor approved at least 96,000 claims, well in excess of congressional projections.[19]

Although it is difficult to prevail unless a claim very clearly lacks merit, coal operator defendants have been able to successfully defend claims under DOL's presumption in large part by DOL's rebuttal provisions which legitimately focus the entitlement inquiry on the basic elements of a compensable claim.

claims, it clearly preserves its basic integrity as a workers' compensation program by requiring a finding not only of the presence of black lung disease, but, also that the claimant's disability due to the disease prevents him from performing coal mine work.

. . . .

I . . . requested that the statement of managers include language to the effect that "*all relevant medical evidence*" be considered in applying the "interim" standards to the reviewed claims. . . .

[Emphasis added.]

[19]Office of Workers' Compensation Programs, U.S. Dep't of Labor, *Black Lung Claims Status Report* (Feb. 20, 1987). From 1978 to the present, at least, 96,000 BLDTF claims have been approved by the Department of Labor pursuant to the 20 C.F.R. § 727.203. The BLDTF is also responsible for compensation in approximately 24,000 previously denied claims approved by the Social Security Administration under the Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95, and referred to the Secretary of Labor for payment from the BLDTF, 30 U.S.C. § 945(a)(2)(A); thus, the total number of claims that are the liability of the BLDTF alone because of the 1977 amendments totals approximately 120,000. *1987 Black Lung Claims Status Report, supra.*

B. The Fourth Circuit's Decisions Below are Contrary to the Black Lung Benefits Act

The Act does not create a general welfare or general medical compensation program. Rather, the program is plainly restricted. The Act's sole purpose is to provide benefits to coal miners and their families on account of total disability or death due to pneumoconiosis. 30 U.S.C. § 901(a). The Fourth Circuit has held, however, that benefits can be awarded in DOL interim presumption claims to a miner who is not totally disabled due to pneumoconiosis or does not even have the disease. These holdings obviously violate the stated purpose of the Act.

As the Third Circuit has said, "even though the Benefits Act has a remedial purpose, it seems perfectly evident that no set of regulations under it may provide that a claimant who is statutorily barred from recovery may nevertheless recover." *Bethenergy Mines, Inc.*, 890 F.2d at 1300 (citation omitted). As the Third Circuit further observed, a holding which results in an award of benefits regardless of whether the law and facts require otherwise is "an unjust result." *Id.*

In the 1977 amendments when Congress authorized the Secretary of Labor to write eligibility regulations, it also emphasized that such regulations must be designed to compensate pneumoconiosis. 30 U.S.C. §§ 902(f)(1)(A), 902(f)(1)(D), 922; *see also*, 30 U.S.C. § 932(h) (requiring the Secretary of Labor "by regulation" to establish standards "which *may* include appropriate presumptions, for determining whether *pneumoconiosis* arose out of employment in a particular coal mine or mines"); 30 U.S.C. § 923(b) (requiring the trier-of-fact to consider all relevant evidence in determining the validity of a claim); 30 U.S.C. § 932(c) (providing that benefits shall not be charged to a mine operator for death or disability due to pneumoconiosis that did not arise, at least in part, out of

employment with that operator after December 31, 1969). [Emphasis added.]

There is nothing within the four corners of the Black Lung Benefits Act, or in its legislative history that supports the Fourth Circuit's decision to permit the award of benefits where it is proven that the miner does not have pneumoconiosis. "Statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982). The Black Lung Benefits Act is no exception to this rule.

C. The Fourth Circuit's Decisions are Contrary to this Court's Decision in Mullins Coal Co.

The Fourth Circuit's decisions prevent "all relevant medical evidence" from being considered at some point during the proof process. These decisions are clearly contrary to this Court's decision in *Mullins*. There, the Court noted:

> After the SSA adopted its interim presumption, its claims approval rate increased, in part due, it is thought, to factfinders failing to consider all of the employers' relevant medical evidence. *To assure that this problem would not infect adjudications under the new Labor interim presumption, the requirement of 30 U.S.C. § 923(b) that all relevant medical evidence be considered in adjudicating SSA claims was explicitly carried over into the Labor presumption's rebuttal section.* Thus, that the "all relevant medical evidence" requirement appears at the beginning of the rebuttal section reflects the genesis of the concern and does not indicate that the drafters intended a more limited evidentiary battle at the invocation stage. *As long as relevant evidence will be considered at some point by the ALJ, the demand that the decision be made on the complete record is satisfied.*

484 U.S. at 149-50 (footnote omitted, emphasis added).

This clear statement that all relevant medical evidence must "be considered at some point" in the proof process reflects this Court's clear reading of congressional intent:

> Rather than merely providing a benefit for those miners who could prove each of the relevant facts by a preponderance of the evidence, Congress intended that those long-term miners who can show that they are truly diseased should have to prove no more. ***But if a miner is not actually suffering from the type of ailment with which Congress was concerned, there is no justification for presuming that that miner is entitled to benefits.*** For not only does that miner fall outside the class of those who need the assistance of an interim presumption, but he also is unlikely to be totally disabled from coal mine employment. By requiring miners to show that they suffer from the sort of medical impairment that initially gave rise to congressional concern, and then by requiring employers to shoulder the remainder of the proof burden, the Secretary's reading of the interim presumption's invocation burden satisfies both the purposes of the statute and the need for a logical connection between the proven fact and the presumed conclusion.

484 U.S. at 158-59 (footnote omitted).

Thus, in *Mullins*, this Court discussed in depth the Act's development and the requirements Congress set forth for the proof process in a case in which the Labor interim presumption is invoked. This Court clearly established a position contrary to that taken by the Fourth Circuit.

D. If Sustained, the Fourth Circuit's Decisions Devastate Defense Rights and Raise Serious Constitutional Problems

In *Mullins*, this Court identified the serious constitutional concerns "lurking beneath the surface" in the proof process in black lung cases. *Mullins Coal Co.*, 484 U.S. at 159 n. 32.

The Fourth Circuit's decisions raise these concerns to the surface. This Court has established a constitutional threshold for statutory presumptions. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 28 (1976) ("Usery"); *Mobile, Jackson, & K.C.R. Co. v. Turnipseed*, 219 U.S. 35 (1910) ("*Mobile, Jackson*"). It is settled that a rule of evidence which permits an ultimate fact to be "presumed" from proof of a predicate fact violates the due process clause if there is no rational connection between the fact shown and the ultimate fact presumed. Such a presumption violates the due process clause if it is so unreasonable as to be arbitrary or if it, "under guise of regulating the presentation of evidence operate[s] to preclude the party from the right to present his defense to the main fact thus presumed." *Mobile, Jackson*, 219 U.S. at 43. *See also Mullins*, 484 U.S. at 159. The validity of presumptions as evidentiary devices to resolve contested issues of fact depends on the strength of the connection between the facts proven and the facts presumed, "and on the degree to which the [evidentiary] device curtails the factfinder's freedom to assess the evidence independently." *County Court of Ulster Cty v. Allen*, 442 U.S. 140, 156 (1979). Labor's interim presumption, as interpreted by this Court, protects this basic principle. As interpreted by the Fourth Circuit, the basic principle is destroyed.

The Fourth Circuit in *Dayton v. Consolidation Coal Co.* held that a presumption of total disability due to coal workers' pneumoconiosis invoked by ventilatory test results cannot be

rebutted by proving the absence of black lung disease. This holding is constitutionally flawed, from a due process perspective, because there is no relationship between the fact proven (*i.e.*, ventilatory studies which satisfy a table) and the fact presumed (i.e., total disability due to coal workers' pneumoconiosis).[20]

The decision in *Taylor v. Clinchfield Coal Co.* produces the same generic result and is flawed in the same way.

A presumption of total disability due to black lung disease based on ventilatory test results or arterial blood gas studies would not be constitutionally suspect, if the factfinder could consider all relevant evidence and determine the existence of the presumed facts upon which a finding of entitlement is ultimately based. *See Mullins*, 484 U.S. at 149; *Usery*, 428 U.S. at 35-37. The Fourth Circuit's determination bars such an approach and clearly denies claims defendants due process of law. No matter how liberal the intent of the Black Lung Benefits Act, or how narrow the sweep of the Due Process Clause is in an economic rights setting, Congress may not require the transfer of money from one private party to another where the basis for requiring such transfer is proven not to exist.

[20]Ventilatory test values specified in the invocation portion of the DOL and SSA interim presumptions suggest neither a diagnosis of black lung disease nor, in the case of older miners, the existence of significant lung impairment. *See* Solomons *A Critical Analysis of the Legislative History Surrounding the Black Lung Interim Presumption and a Survey of Its Unresolved Issues*, 83 W. Va. L. Rev. 869, 880-83, 885-86, 899-900 (1981).

II.

PITTSTON COAL GROUP DOES NOT COMPEL THE INVALIDATION OF DOL'S REBUTTAL REGULATIONS

Several circuit courts of appeal have concluded that this Court's opinion in *Pittston Coal Group* compels the invalidation of DOL's rebuttal rules.[21] This is simply incorrect. This Court expressly declined to rule on DOL's rebuttal rules in *Pittston Coal Group* because claimants in the cases before the Court conceded the validity of those rules.[22] Moreover, the major problem caused by the interplay of DOL and SSA rules as defined in *Pittston Coal Group* is not present here.

The essential finding in *Pittston Coal Group* is that DOL's ten-year invocation rule is more restrictive than SSA's counterpart. As such, based on 30 U.S.C. § 902(f)(2), this Court ruled the DOL rule could not stand.[23] It is not clear that the same flaw infects the rebuttal side.

SSA's rebuttal provision, 20 C.F.R. § 410.490(c), does not specifically mention rebuttal by proof that pneumoconiosis is not present or did not contribute to a miner's disability or death; however, § 410.490 does clearly encompass consideration of whether pneumoconiosis was present or contributed to a miner's death or disability. SSA rebuttal rule, 20 C.F.R. § 410.490(c)(2), cross-references another SSA regulation, 20 C.F.R. § 410.412(a)(1) (part of the SSA definition of "total disability") which then cross-references still other SSA rules,

[21]In addition to the Fourth Circuit, the Seventh Circuit concluded that *Pittston Coal Group* required the invalidation of DOL's rebuttal rules. *Taylor v. Peabody Coal Co.*, 892 F.2d 503, 506 (7th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3725 (U.S. May 2, 1990) (No. 89-1696).

[22]488 U.S. at 119, 121.

[23]488 U.S. at 117.

20 C.F.R. § 410.424 ("Determining total disability: Medical criteria only") and 20 C.F.R. § 410.426 ("Determining total disability: Age, education, and work experience criteria"). Section 410.426(a), among other things, states that a miner "shall be determined to be under a disability *only* if his *pneumoconiosis* is (or was) the primary reason for his inability to engage in such comparable and gainful work. *Medical impairments other than pneumoconiosis may not be considered.*" [Emphasis added.]

This trail back through the body of SSA's permanent rules is just like the one followed by this Court in *Pittston Coal Group*, and the same analytic format validates Labor's rebuttal rules. The SSA rules incorporated into SSA's rebuttal section, 20 C.F.R. § 410.490(c), plainly emphasize the primary significance of medical evidence and preclude an award based on medical impairments other than pneumoconiosis. In promulgating its rules, the Labor Department simply clarified SSA's reference by incorporation but the Labor rules are not more restrictive.

In *Pittston Coal Group*, this Court reallocated burdens of proof in DOL black lung claims, finding that the agency had not allocated them correctly in writing its rules. It is a far different matter to directly change the stated purpose of the Act. This Court has recognized this in a number of cases and held that courts "must reject administrative constructions of the statute, whether reached by adjudication or by rulemaking, that are inconsistent with the statutory mandate or frustrate the policy that Congress sought to implement. *Federal Election Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981). The proper mode of construction effectuates all of the provisions of the Act. *Richards v. United States*, 369 U.S. 1, 11 (1962)). The Fourth Circuit's approach does not do so.

A review of the legislative history confirms Congress's intent to permit rebuttal in light of relevant medical evidence. The Conference Report accompanying the 1977 amendments instructs DOL to write its own interim presumption ensuring the consideration of all relevant medical evidence. H.R. Rep. No. 864, 95th Cong., 2d Sess. 16 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 309. Several members of the Conference Committee emphasized the point in final debate before enactment. 124 Cong. Rec. 2333 (1978) (statement of Sen. Javits); 124 Cong. Rec. 3426, 3431 (1978) (statements of Reps. Perkins and Simon). There is absolutely nothing to indicate any intent either to limit or preclude the consideration of any kind of medical evidence or otherwise require benefit payments based on any medical impairment but pneumoconiosis.

The DOL rebuttal rules cleanly and simply carry out the intent of Congress with respect to the Black Lung Benefits Act.

III

THE COURT SHOULD NOT RESOLVE THIS LITIGATION BY DUMPING LIABILITY ON THE TRUST FUND

On rehearing in the Third Circuit, Mrs. Pauley, the petitioner in No. 89-1714, acknowledged that 30 U.S.C. § 932(c) precludes the imposition of liability on the mine operator if the operator establishes that the miner's disability or death did not arise from pneumoconiosis caused in part by the miner's employment with the operator. *Petition For Rehearing With Suggestion for Rehearing In Banc of Respondent, John C. Pauley* at 13-15, *Bethenergy Mines Inc., supra* note 2. Mrs. Pauley suggests that this provision is, however, no impedi-

ment to an award to her because the Black Lung Disability Trust Fund may not benefit from the mandate of 30 U.S.C. § 932(c). *Id.* This invitation to raid the Trust Fund for the payment of non-meritorious claims should be rejected.

Neither the Act nor anything in its legislative history contemplates any circumstance in which the eligibility criteria vary depending upon whether the claim is being defended by a mine operator or the Department of Labor on behalf of the Trust Fund. The Trust Fund merely stands in for the operator if the operator refuses to pay, or if the miner was last employed prior to January 1, 1970, or if no mine operator can be identified. 30 U.S.C. § 934, 26 U.S.C. §§ 9501(d)(1)(B), 9501(d)(2) The concern that prompted Congress to specifically commit the Trust Fund to pay benefits for the oldest claims and where "there is no operator who is required to secure the payment of such benefits", *id.*, focused on corporate changes within the industry that made the identification of a liable operator difficult or impossible. *See Director, Office of Workers' Compensation Programs v. Black Diamond Coal Mining Co.*, 598 F.2d 945, 949-50 (5th Cir. 1979). There clearly was no intent here to discriminate in entitlement determinations depending upon whether or not a specific mine owner could be held liable.

Congress's intent to merely place the Trust Fund in the shoes of the operator is confirmed in 30 U.S.C. § 932(a) where all procedural rights and obligations conferred on operators by the incorporated provisions of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1988), are deemed to apply to the Trustees of the Fund as well. *See Republic Steel Corp. v. U.S. Department of Labor*, 590 F.2d 77, 79 (3d Cir. 1978). There is no case or statement in the Act or elsewhere supporting the proposition that miners have more rights when the Trust Fund, rather than an employer, is the defendant.

It is equally important that the Trust Fund's obligations are ultimately paid by individual mine operators even though an individual mine operator may have no right to defend a claim for which the Trust Fund may be liable, 30 U.S.C. § 934(b)(1)(B). Use of coal tax revenues derived from those operators to pay benefits cannot be squared with 30 U.S.C. § 932(c) simply because it is the Trust Fund that is the claim defendant. Individual mine operators should not pay, directly or indirectly, claims that do not involve total disability or death due to pneumoconiosis.[24]

The theory proposed in this regard is also clearly inconsistent with the language and intent of the Act, and it should be rejected for this reason.

[24]Were the Court to accept the theory of Trust Fund liability in the absence of disease or related disability, it too would violate the plainly stated purpose of the Act set forth in 30 U.S.C. § 901(a).

CONCLUSION

The Fourth Circuit's decisions are wrong for the reasons set forth and would impose substantial unwarranted burdens on the coal industry. Therefore, the judgments should be reversed. The decision of the Third Circuit is correct and should be affirmed.

Respectfully submitted,

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